Md Zainuddin bin Raujan v Public Prosecutor

A

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05–160 OF 2009
ZALEHA ZAHARI, AHMAD MAAROP AND BALIA YUSOF JJCA
4 MAY 2012

B

Criminal Law — Dangerous drugs — Trafficking — Appeal against conviction and sentence — Admissibility of information obtained under s 27 of the Evidence Act 1950 — Appellant pointed to police party various spots where drugs were recovered — Statutory caution under s 37A of the Dangerous Drugs Act 1952 ('DDA') administered — Whether trial judge misdirected himself when he admitted s 27 information to prejudice of appellant — Whether trial judge seriously erred when he ruled that PW5 was credible, contrary to evidence adduced — Whether trial judge's failure to recognise prosecution's failure to call other key witnesses had created gaps in its own case — Whether trial judge failed to appreciate defence case — Whether appellant failed to rebut statutory presumption under s 37(da) of the DDA on balance of probabilities — Dangerous Drugs Act 1952 ss 37(da) & 39B(1)(a)

C

D

E

Evidence — Admissibility — Information obtained during raid on premises — Appellant pointed to police party various spots where drugs were recovered — Whether statutory caution under s 37A of the Dangerous Drugs Act 1952 administered — Whether prosecution under no obligation to prove voluntariness of information given — Whether trial judge misdirected himself when he admitted s 27 information to prejudice of appellant — Evidence Act 1950 s 27

F

G

Evidence — Prosecution case — Failure to call witness — Whether by not calling witness created gap in prosecution case — Whether their evidence was material for unfolding of narratives of prosecution case — Whether evidence sufficient to make out prima facie case against appellant

H

Evidence — Witnesses — Credibility of — Judicial discretion of accepting or rejecting evidence of particular witness — Trial judge's audio visual advantage of assessing witness — Appellate courts will always slow to interfere in matters relating to credibility of witnesses — Whether trial judge seriously erred when he ruled that PW5 was credible, contrary to evidence adduced

I

This was an appeal by the appellant against his conviction for trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA').

The facts of the case were that SP5 and his party, acting on information, raided a house at Tongkang Pecah, Batu Pahat and arrested the appellant who was then brought back to Balai Polis Tongkang Pecah. In the course of an interrogation, the appellant admitted to SP5 that he had kept drugs in the 'kawasan kebun' behind his father's house at Sungai Balang Besar, Muar. SP5 then administered the statutory caution under s 37A of the DDA and thereafter reduced the said information into writing on a piece of paper tendered as exh P17. In the 'kawasan kebun', the appellant pointed to four different spots which were actually mounds of fallen coconut trees. Drugs which formed the subject matter of the charge against the appellant were recovered from four different spots pointed out by the appellant. At the end of the prosecution's case, the learned trial judge held that a prima facie case was made out against the appellant and called upon him to enter his defence. The appellant denied that he had pointed out to the police party the various spots where the drugs were recovered and stated that the drugs in the cupboard and the coconut mounds were recovered by the police themselves. At the end of the defence case, the learned trial judge held that the crux of the defence case was grounded upon mere denial. The trial judge was of the view that the evidence of the appellant's wife, DW2, was of no help to the defence, was a fabrication and that she had lied, and was thus, of little evidentiary value. The appellant was accordingly found guilty, convicted of the three charges preferred against him and sentenced to death. In support of the appeal, the appellant put forth four grounds of appeal namely as follows: (a) that the learned trial judge misdirected himself when he admitted the s 27 information to the prejudice of the appellant; (b) that the learned trial judge seriously erred when he ruled that PW5 was credible, contrary to the evidence adduced; (c) that the learned trial judge failed to recognise that the prosecution's failure to call other key witnesses had created gaps in its own case; and (d) that the learned trial judge failed to appreciate the defence case.

Held, dismissing the appeal, affirming the conviction and sentence:

(1) It is trite law that a trial within a trial is not necessary to determine the admissibility of the information obtained under s 27 of the Evidence Act 1950. The prosecution is under no obligation to prove voluntariness of the information given. The admission of the statement is an exercise of discretion by the trial judge and based on established legal principles. In the instant case, the learned trial judge had rightly exercised his discretion in refusing the application for a trial within a trial (see para 13).

(2) The learned trial judge in carrying out his function as a trier of facts and reception of evidence was merely exercising his judicial discretion of accepting or rejecting the evidence of a particular witness. In this instant, His Lordship rejected certain parts of PW11's evidence and accepted the rest. It was within the purview of the learned trial judge's function to assess the credibility of witnesses who gave evidence before him. He had

the audio visual advantage of assessing them. This court was in no better position than the learned trial judge to assess the credibility of witnesses and in this case, PW5 in particular. Further, it is also trite law that the appellate courts will always be slow to interfere in matters relating to the credibility of witnesses (see paras 17–18).

(3) The right to call or not to call a particular witness lies solely with the prosecution. But where the prosecution's evidence falls short of proving a prima facie case at the end of its case, the right not to call such witness/witnesses and to make him available to the defence will be of no avail. The present appeal was not such a case. The non-calling of Chief Inspector Ramesh and Sarjan Mejar Ahmad Rosli did not create a gap in the prosecution's case. Their evidence was not material for the unfolding of the narratives of the prosecution's case. The prosecution was content with the evidence of PW5 to prove their case against the appellant, without calling these two witnesses to testify. That was their prerogative. The learned trial judge rightly found that PW5's evidence together with the evidence of other witnesses called by the prosecution was sufficient to make out a prima facie case against the appellant (see para 22).

(4) This court agreed with the learned trial judge that the totality of the evidence put forth by the appellant was but a plain denial which, in the circumstances of the case, and without any supporting evidence would be insufficient to cast a reasonable doubt on the prosecution's case. The learned trial judge had considered and evaluated all of the evidence before him and was right in arriving at the findings and conclusion which he did. The records speak for themselves. The appellant had also failed to rebut on the balance of probabilities, the statutory presumption under s 37(da) of the DDA (see para 28).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu terhadap sabitannya kerana mengedar dadah berbahaya di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Fakta kes adalah bahawa SP5 dan pasukannya, bertindak atas maklumat, telah menyerbu sebuah rumah di Tongkang Pecah, Batu Pahat dan menangkap perayu yang kemudian telah dibawa balik ke Balai Polis Tongkang Pecah. Semasa soal siasat, perayu telah mengakui kepada SP5 bahawa dia telah menyimpan dadah itu dalam 'kawasan kebun' di belakang rumah bapanya di Sungai Balang Besar, Muar. SP5 kemudian telah memberi amaran statutori di bawah s 37A ADB dan berikutan itu maklumat tersebut dibuat secara bertulis atas sekeping kertas yang ditender sebagai eksh P17. Dalam 'kawasan kebun', perayu telah menunjukkan empat tempat berbeza yang sebenarnya bonggolan pokok kelapa yang telah tumbang. Dadah yang membentuk perkara asas pertuduhan terhadap perayu telah ditemui di empat tempat berbeza yang ditunjukkan oleh perayu. Di akhir kes pendakwaan, hakim perbicaraan yang bijaksana telah memutuskan terdapat kes prima facie terhadap perayu dan

mengarahkan perayu untuk memasukkan pembelaannya. Perayu menafikan bahawa dia telah menunjukkan kepada pasukan polis tempat-tempat di mana dadah tersebut ditemui dan menyatakan bahawa dadah yang ditemui di dalam almari dan timbunan kelapa telah dijumpai oleh pihak polis sendiri. Di akhir kes pembelaan, hakim perbicaraan yang bijaksana memutuskan bahawa asas persoalan kes pembelaan adalah berasaskan penafian semata-mata. Hakim perbicaraan berpendapat bahawa keterangan isteri perayu, DW2, tidak membantu dalam pembelaan, adalah suatu rekaan dan bahawa dia telah menipu, dan oleh itu, kurang nilai keterangan. Perayu sewajarnya telah didapati bersalah, disabitkan atas tiga pertuduhan yang dibuat terhadapnya dan dihukum mati. Bagi menyokong rayuan itu, perayu telah mengemukakan empat alasan rayuan iaitu seperti berikut: (a) bahawa hakim perbicaraan yang bijaksana telah salah arah apabila beliau menerima maklumat s 27 yang memprejudiskan perayu; (b) bahawa hakim perbicaraan yang bijaksana telah terkhilaf dengan serius apabila beliau memutuskan bahawa PW5 boleh dipercayai, bertentangan dengan keterangan yang dikemukakan; (c) bahawa hakim perbicaraan yang bijaksana telah gagal untuk menyedari kegagalan pendakwaan untuk memanggil saksi-saksi utama lain yang telah membentuk jurang dalam kesnya sendiri; dan (d) bahawa hakim perbicaraan yang bijaksana telah telah gagal memahami kes pembelaan.

Diputuskan, menolak rayuan, mengesahkan sabitan dan hukuman:

(1) Adalah undang-undang tetap bahawa perbicaraan dalam perbicaraan tidak perlu untuk menentukan kebolehterimaan maklumat yang diperoleh di bawah s 27 Akta Keterangan 1950. Pendakwaan tidak mempunyai kewajipan untuk membuktikan kesukarelaan pemberian maklumat itu. Penerimaan kenyataan adalah pelaksanaan budi bicara oleh hakim perbicaraan dan berdasarkan prinsip-prinsip perundangan yang mantap. Dalam kes ini, hakim perbicaraan yang bijaksana telah dengan betul melaksanakan budi bicara beliau dengan menolak permohonan untuk perbicaraan dalam perbicaraan (lihat perenggan 13).

(2) Hakim perbicaraan yang bijaksana dalam menjalankan fungsinya sebagai penentu fakta dan penerima keterangan hanya melaksanakan budi bicara kehakiman beliau dengan menerima atau menolak keterangan saksi tertentu. Di sini, Yang Arif telah menolak bahagian tertentu dalam keterangan PW11 dan menerima yang lain. Adalah dalam skop fungsi hakim yang bijaksana untuk menilai kebolehpercayaan saksi-saksi yang memberi keterangan di hadapan beliau. Beliau mempunyai kelebihan audio visual untuk menilai mereka. Mahkamah ini bukan dalam kedudukan lebih baik daripada hakim perbicaraan yang bijaksana untuk menilai kebolehpercayaan saksi-saksi dan dalam kes ini, PW5 khususnya. Selanjutnya, adalah juga undang-undang tetap bahawa Mahkamah

Rayuan akan sentiasa perlahan untuk campur tangan dalam perkara-perkara berkaitan kebolehpercayaan saksi-saksi (lihat perenggan 17–18).

(3) Hak untuk memanggil atau tidak memanggil saksi tertentu terletak hanya dengan pendakwaan. Namun di mana keterangan pendakwaan tidak dapat membuktikan kes prima facie di akhir kesnya, hak untuk tidak memanggil saksi/saksi-saksi dan untuk membuatnya sedia ada kepada pembelaan akan sia-sia sahaja. Rayuan ini bukan kes sedemikian. Dengan tidak memanggil Ketua Inspektor Ramesh dan Sarjan Mejar Ahmad Rosli tidak mewujudkan jurang dalam kes pendakwaan. Keterangan mereka tidak penting dalam mendedahkan naratif kes pendakwaan. Pihak pendakwaan berpuas hati dengan keterangan PW5 untuk membuktikan kes mereka terhadap perayu, tanpa memanggil dua saksi tersebut untuk memberi keterangan. Ini adalah prerogatife mereka. Hakim perbicaraan yang bijaksana dengan betul telah mendapati bahawa keterangan PW5 bersama keterangan saksi-saksi lain yang dipanggil oleh pendakwaan adalah mencukupi untuk membuktikan kes prima facie terhadap perayu (lihat perenggan 22).

(4) Mahkamah ini bersetuju dengan hakim perbicaraan yang bijaksana bahawa keseluruhan keterangan yang dikemukakan oleh perayu hanya penafian semata-mata yang mana, dalam keadaan kes, dan tanpa apa-apa keterangan sokongan adalah tidak mencukupi untuk menimbulkan keraguan munasabah terhadap kes pendakwaan. Hakim perbicaraan yang bijaksana telah mempertimbangkan dan menilai semua keterangan di hadapan beliau dan betul dalam membuat penemuan dan kesimpulan beliau. Rekod dengan jelas menunjukkan sedemikian. Perayu juga telah gagal mematahkan atas imbangan kebarangkalian, andaian statutori di bawah s 37(da) ABD (lihat perenggan 28).]

Notes

For a case on failure to call witness, see 7(2) *Mallal's Digest* (4th Ed, 2013 Reissue) para 2692.

For a case on information obtained during raid on premises, see 7(1) *Mallal's Digest* (4th Ed, 2013 Reissue) para 103.

For cases on credibility of, see 7(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3152–3206.

For cases on trafficking, see 4(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 205–300.

Cases referred to

Amathevelli a/p Ramasamy v PP [2009] 2 MLJ 367; [2009] 3 CLJ 121, FC (refd)

Amathevelli a/p Ramasamy v PP [2008] 3 MLJ 782; [2008] 4 CLJ 413, CA (refd)

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Che Omar bin Mohd Akhir v PP [1999] 2 MLJ 689; [1999] 2 CLJ 780, CA (refd)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232; [1983] 2 CLJ 10, FC (refd)
Francis a/l Antonysamy v PP [2003] 2 MLJ 49; [2003] 2 CLJ 481, CA (refd)
Herchun Singh & Ors v PP [1969] 2 MLJ 209, FC (refd)
Khaw Cheng Bok & Ors v Khaw Cheng Poon & Ors [1998] 3 MLJ 457, HC (refd)
Krishna Rao a/l Gurumurthi v PP and another appeal [2009] 3 MLJ 643; [2009] 2 CLJ 603, FC (refd)
Lai Kim Hon & Ors v PP [1981] 1 MLJ 84, FC (refd)
Lee Ah Sang v PP [2007] 6 MLJ 1, FC (refd)
Osenton (Charles) & Co v Johnston [1942] AC 130, HL (refd)
PP v Hashim bin Hanafi [2002] 4 MLJ 176, HC (refd)
PP v Datuk Haji Harun bin Idris (No 2) [1977] 1 MLJ 15 (refd)
Thavanathan a/l Balasubramaniam v Pendakwa Raya [1997] 3 CLJ 150, SC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 37(da), 37A, 39B(1)(a)
Evidence Act 1950 s 27

Appeal from: Criminal Trial No 45–18 of 2005 (High Court, Muar)

Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the appellant.
Shoba Venugobal (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Balia Yusof JCA (delivering judgment of the court):

[1] This is an appeal by the accused person against his conviction for trafficking in dangerous drugs on 10 September 2004. He was charged with three counts under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') of trafficking ie (a) 6,517g of cannabis (b) 137.88g of heroin and (c) 139.38g of monoacetylmorphines at house No SBB 49 Sungai Balang Besar, Muar, in the state of Johor.

[2] Briefly, the facts of the case are as follows. Acting on information, SP5 and his party raided a house at No 503 Jalan Parit Jalil, Tongkang Pecah Batu Pahat and arrested the appellant who was then brought back to Balai Polis Tongkang Pecah. In the course of an interrogation, the appellant admitted to SP5 that he had kept drugs in the 'kawasan kebun' behind his father's house at No SBB 49 Sungai Balang Besar, Muar.

[3] SP5 then administered the statutory caution under s 37A of the DDA and thereafter reduced the said information into writing on a piece of paper tendered as exh P17. Following SP5, the appellant has also affixed his signature twice on the said piece of paper.

[4] SP5 and his men then proceeded to the address given in the information and together with Chief Inspector Ramesh and SM Ahmad Rosli conducted a search in the house whilst SI Abdullah guarded the appellant. Nothing incriminating was found. SP5 then instructed SI Abdullah to change the appellant's handcuff from behind to the front. The appellant then led SP5 and his men to the orchard behind the house. The appellant pointed to an old cupboard. On the instruction of SP5, SM Ahmad Rosli searched the drawer and recovered two transparent plastic packets containing substances suspected to be heroin. In the two packets were a total of 14 smaller packets containing substances suspected to be heroin.

[5] In the 'kawasan kebun', the appellant pointed to four different spots which were actually mounds of fallen coconut trees. Drugs which formed the subject matter of the charge against the appellant were recovered from four different spots pointed out by the appellant.

FINDING OF THE TRIAL JUDGE

[6] At the end of the prosecution's case, the learned trial judge held that a prima facie case was made out against the appellant and called upon him to enter his defence.

[7] The appellant gave his evidence on oath narrating the flow of events which was not inconsistent with the evidence led by the prosecution. Be that as it may there were some differences which the learned trial judge had noted as listed out at pp 40–41 of the appeal record. The appellant denied that he had pointed out to the police party the various spots where the drugs were recovered and stated that the drugs in the cupboard and the coconut mounds were recovered by the police themselves.

[8] At the end of the defence case, the learned trial judge held that the crux of the defence case was grounded upon mere denial. The trial judge was of the view that the evidence of the appellant's wife, DW2, to be of no help to the defence, to be a fabrication, and that she had lied, and was of little evidentiary value. The appellant was accordingly found guilty, convicted of the three

charges preferred against him and sentenced to death.

THE APPEAL

[9] In support of the appeal, learned counsel for the appellant put forth four grounds of appeal namely as follows:

(a) that the learned trial judge misdirected himself when he admitted the s 27 information to the prejudice of the appellant;

(b) that the learned trial judge seriously erred when when he ruled that PW5 was credible, contrary to the evidence adduced;

(c) that the learned trial judge failed to recognise that the prosecution's failure to call other key witnesses had created gaps in its own case; and

(d) that the learned trial judge failed to appreciate the defence case.

Whether s 27 evidence is rightly admitted?

[10] Learned counsel's main objection to the admissibility of the s 27 information is premised on the ground of unfairness because of the rejection by the learned trial judge of his application for a trial within a trial to be held before the admission of exh P17.

[11] The learned trial judge was satisfied that the prerequisites of s 27 of the Evidence Act 1950 had been complied. The information given by the appellant was proven by oral evidence of PW5. PW5 testified that upon interrogation at Balai Polis Tongkang Pecah, the appellant admitted that he had kept drugs in the *kawasan kebun* behind his father's house at SBB 49, Sungai Balang Besar. This manner of giving evidence of information received under s 27 was explained by Augustine Paul J (as he then was) in *Public Prosecutor v Hashim b Hanafi* at pp 185–186 as follows:

> Information given under s 27 is not a matter that is required by law to be in writing so as to be governed by ss 91–92 of the Act. Therefore the information must be proved by oral evidence pursuant to s 60(b) of the Act. Thus a written record of the information given by the accused will not by itself be substantive evidence of its contents and it is what the witness deposes in court as having been said by the accused that will be evidence (see *Bhagirath*). Where the information is contained in a police diary it can only be used for the purpose of refreshing memory (see *Public Prosecutor v Er Ah Kiat* [1966] 1 MLJ 9). Where it is contained in any other document it can, at the highest, serve only as evidence of corroboration. It is on this basis that a report prepared by a chemist pertaining to his analysis of drugs cannot be tendered as substantive evidence of its contents but only as corroboration of his oral evidence in court under s 157 of the Act (see *Saw Thein Teik v R* [1953] MLJ

124; *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273). The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible (see *Deputy Public Prosecutor v Hester* [1972] 3 All ER 1056). Its role is to confirm other evidence in the sense that it renders that other evidence more probable (see *Doney v R* (1990) 171 CLR 207; *Deputy Public Prosecutor v Kilbourne* [1973] AC 729). It cannot therefore amount to that other evidence itself. Thus the record of an information will only enhance the credibility of the witness and the absence of it cannot render the oral evidence of it inadmissible; nor can it be a substitute for the evidence that it is meant to corroborate.

(See *Amathevelli a/p Ramasamy v Public Prosecutor* [2009] 2 MLJ 367; [2009] 3 CLJ 121).

[12] Exhibit P17 is the piece of paper on which PW5 wrote down the information given by the appellant after administering the statutory caution under s 37A of the DDA. That information led the police to the discovery of the drugs, the subject matter of the charge against the appellant. On the admissibility of exh P17 this is what His Lordship had to say at pp 30–31 of the appeal record:

On the facts and evidence, I am satisfied that all the ingredients of s 27 of the Evidence Act, 1950, had been fulfilled namely –

(i) the information was supplied by the accused after commission of an offence or during the commission of an offence – *Choo Teck Soon Soo v PP* [1954] MLJ 63,

(ii) the accused was under the custody of the police at the time of the information was supplied – *Son Teh Sang & Ors v PP* [1964] MLJ 380. Here the evidence revealed that the accused was under custody at Balai Polic Tongkang Pecah at the time he supplied the information to PW–5,

(iii) the information supplied by the accused has caused the discovery of a fact i.e the offending drugs and the said information relates distinctly to the fact discovered – *Wai Chan Leong v PP* [1989] 3 MLJ 356,

(iv) the fact or thing discovered as a result of the information must be concealed – *Yee Ye Mang v Public Prosecutor* [197] 1 MLJ 120. Here the evidence given by PW–5 showed that the offending drugs were all concealed, which without the information supplied by the accused and the accused pointing the same, it could not have been discovered and

(v) the police has no prior knowledge of the fact or thing concealed – *PP v Mohd Farid bin Mohd Sukis & Anor* [2002] 8 CLJ 814. That was the first time PW-5 and his party went to the SBB house and thereafter to the kawasan kebun.

Upon the premise enumerated above, I accepted the evidence of PW–5 and admit exhibit P–17 in evidence without more. This evidence is relevant as it directly connected the accused to the offending drugs.

[13] We fully agree with the learned trial judge in that it is trite law that a trial within a trial is not necessary to determine the admissibility of the said information obtained under s 27 of the Evidence Act 1950. The prosecution is under no obligation to prove voluntariness of the information given (see *Amathevelli a/p Ramasamy v Public Prosecutor* [2008] 3 MLJ 782; [2008] 4 CLJ 413). The admission of the statement is an exercise of discretion by the trial judge and based on established legal principles (see *Krishna Rao a/l Gurumurthi v Public Prosecutor and another* [2009] 3 MLJ 643; [2009] 2 CLJ 603, *Francis a/l Antonysamy v Public Prosecutor* [2003] 2 MLJ 49; [2003] 2 CLJ 481). In *Krishna Rao a/l Gurumurthi v Public Prosecutor* the Federal Court also quoted the case of *Osenton (Charles) & Co v Johnston* [1942] AC 130 which stated that there is a presumption that the judge has rightly exercised his discretion. This has been fully appraised by the learned trial judge as evident from pp 28–29 of the appeal record.

[14] We have carefully perused the said records and we come to the conclusion that the learned trial judge has rightly exercised his discretion in refusing the application for a trial within a trial in the instant case.

[15] For the aforesaid reason, we find no merit in counsel's objection on this ground.

Whether PW5 a credible witness?

[16] Learned counsel for the appellant submitted that PW5 is not a credible witness. According to him PW5's evidence was contradictory to his own report, and also contradicts the evidence given by other witnesses namely, PW9, PW10, PW7 and PW11. In the course of his submission, Encik Hisyam Teh Poh Teik in his usual candour and eloquence has painstakingly attempted to demonstrate to us the various so called contradictions. We are not convinced.

[17] We have also scrutinised the records carefully and find that the learned trial judge spent a good part of his judgment assessing the evidence of the not only PW5, but all other witnesses for the prosecution in concluding that a prima facie case had been established. The learned trial judge was constantly mindful of the contradictions of the evidence before him. From pp 10–19 of the appeal record His Lordship had directed his attention to the analysis of the evidence of the witnesses vis a vis the issue of contradictions and discrepancies in the evidence. At pp 21–25 of the record we also note that the learned trial judge has specifically addressed the issue of contradiction between the evidence of PW5 with that of PW9, and PW11 and finally concluded that PW5 was a credible witness. We pause here to note that the learned trial judge in carrying out his function as a trier of facts and reception of evidence was merely exercising his judicial discretion of accepting or rejecting the evidence of a

particular witness. In this instant, His Lordship rejected certain parts of PW11's evidence and accepted the rest. Of course, the learned trial judge was entitled to do so (*Public Prosecutor v Datuk Haji Harun bin Idris (No 2)* [1977] 1 MLJ 15 (FC), *Lee Ah Sang v Public Prosecutor* [2007] 6 MLJ 1, *Herchun Singh & Ors v Public Prosecutor* [1969] 2 MLJ 209 (FC), *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] 2 CLJ 10 (FC), *Lai Kim Hon & Ors v Public Prosecutor* [1981] 1 MLJ 84 (FC), *Che Omar bin Mohd Akhir v Public Prosecutor* [1999] 2 MLJ 689; [1999] 2 CLJ 780 (CA)).

[18] It is within the purview of the learned trial judge's function to assess the credibility of witnesses who gave evidence before him. He had the audio visual advantage of assessing them. We have not. Further, it is also trite law that the appellate courts will always be slow to interfere in matters relating to the credibility of witnesses. It serves no useful purpose for us to again and again list down the line of authorities on this issue.

[19] We are in no better position than the learned trial judge to assess the credibility of witnesses and in this case, PW5 in particular. In our considered views, this ground is devoid of any merit.

Whether there is a gap in the prosecution's case?

[20] Learned counsel for the appellant submitted that the failure of the prosecution to call Chief Inspector Ramesh and Sarjan Major Ahmad Rosli created a gap in their case. Both these two named persons were part of the police party that went to the appellant's father's house at Sungai Balang Besar, Muar, Johor. They were with PW5 most of the time and as such, it was submitted that they should have been called to corroborate PW5. The appellant took the stand that the evidence of PW5 was littered with contradictions, inconsistencies and unexplained gaps. In the words of the learned trial judge, in setting out the defence contention on PW5's testimony, 'his evidence requires corroboration from these two persons to earn some semblance of credibility'. Learned counsel for the defence submitted that the evidence of these two witnesses is necessary to address the following questions:

(a) whether the appellant was assaulted at the Batu Pahat house and at the police station;

(b) whether it was the appellant who gave the information in exh P17 at the police station;

(c) whether the appellant alone was brought to the 'kebun' behind his father's house, or whether the appellant was brought there together with the other seven persons; and

(d) whether the appellant was threatened to sign exh P17.

[21] It is the finding of the learned trial judge that the contradictions in the evidence of PW5 were either immaterial or minor and had accepted PW5's evidence. The evidence of PW5 was held to be credible enough and sufficient to prove the ingredients of the charges preferred against the appellant. His Lordship ruled that the case did not fall within the category of cases where the testimony of the single witness itself required that corroboration should be insisted upon as a rule of prudence (see *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85). It is trite that the testimony of a single witness, if believed, is sufficient to establish any fact (see *Khaw Cheng Bok & Ors v Khaw Cheng Poon & Ors* [1998] 3 MLJ 457). Witnesses are weighed, not counted (*testes ponderantur non numerantor*).

[22] The right to call or not to call a particular witness lies solely with the prosecution. But where the prosecution's evidence falls short of proving a prima facie case at the end of its case, the right not to call such witness/witnesses and to make him available to the defence will be of no avail. The present appeal is not such a case. In our view, the non calling of these two witnesses does not create a gap in the prosecution's case. Their evidence is not material for the unfolding of the narratives of the prosecution's case. The prosecution was content with the evidence of PW5 to prove their case against the appellant, without calling Chief Inspector Ramesh and Sarjan Mejar Ahmad Rosli to testify. That is their prerogative. The learned trial judge found (in our view rightly) that PW5's evidence together with the evidence of other witnesses called by the prosecution was sufficient to make out a prima facie case against the appellant.

[23] Again, we are not persuaded by the argument put forth by learned counsel and therefore this ground must also fail.

Whether the trial judge had failed to appreciate the defence case?

[24] It was submitted before us that the learned trial judge has erred in holding that the defence of the appellant was a mere denial. This, according to learned counsel arises out of the failure of the learned trial judge to appreciate the defence evidence.

[25] We disagree. In his judgment (at p 44 of the appeal record) the learned trial judge has set out the denials made by the appellant as follows:

> Having considered the totality of the evidence, I opined that the crux of the defence case is grounded upon mere denial -
>
> (i) the accused denied giving the said information to the police while under custody at Balai Tongkang Pecah;
>
> (ii) denied PW-5 administering the caution under s 37 of the DDA 1952;

(iii) denied giving the information that he kept drugs at the kawasan kebun of his father's house;

(iv) denied affixing his signatures on exh P-17;

(v) denied leading/taking PW-5 and PW-5 and his team to the kawasan kebun where the offending drugs were discovered, and

(vi) denied pointing the locations of the drugs discovered.

It is trite that such denial without other proof to reasonably dislodge the prosecution evidence is not sufficient to cast a doubt on the prosecution case. I am satisfied that on the evidence there were no other proof adduced by the accused to sustain his denial.

[26] What the learned trial judge stated in the above mentioned passage is his summary and evaluation of the evidence given by the appellant on oath. The appellant also called DW2, his wife. The learned trial judge's appraisal of DW2's evidence as stated at pp 45–46 of the appeal record states:

DW-2's (the accused's wife) evidence is of no help either. She claimed to have been arrested by the police together with the accused and brought along to Balai Tongkang Pecah. Her 2 children were also taken to Balai Polis Tongkang Pecah. She sat outside the Balai and heard the accused being beaten and the accused screaming in pain. She added that she was also taken to the SBB house. However when the 7 other arrested persons were taken to IPD Muar, she was left behind. Freed.

DW-2 was plainly lying -

(i) there was no police report of her arrest whatsoever;

(ii) if she was under arrest why was she sitting outside the Balai at Balai Polis Tongkang Pecah;

(iii) none of the civilian witnesses, PW-8, PW-9, PW-10 and PW-11, testified nor adverted to her presence that she was with them gathered together at the kitchen portion of the SBB house;

(iv) if she was under arrest why was she left behind at the SBB house when the 7 other persons arrested at the SBB house were all taken to IPD Muar and placed under remand for 10 days thereafter; and

(v) she did not lodge any police report of the alleged beatings suffered by her husband.

Her evidence is indeed a fabrication. It is of little evidentiary value bearing in mind that her arrest was the crux of her testimony where her further evidence flows on. It has no bearing on the evidence produced by the prosecution nor add value to the accused's defence.

[27] It has been affirmed by the Federal Court in *Thavanathan a/l Balasubramaniam v Pendakwa Raya* [1997] 3 CLJ 150 that the degree or extent to which the evidence need to be examined would depend on the particular

facts and circumstances of each case and the issues involved. What we have reproduced from the learned trial judge's judgment in the preceding paragraphs is testimony to the fact that the defence evidence has been considered and fully appraised by His Lordship.

[28] As to the learned trial judge's assessment of the defence evidence, we are unable to agree with the learned appellant counsel's submission. We agree with the learned trial judge that the totality of the evidence put forth by the appellant was but a plain denial which, in the circumstances of the case, and without any supporting evidence would be insufficient to cast a reasonable doubt on the prosecution's case. The appellant has also failed to rebut on the balance of probabilities, the statutory presumption under s 37(da) of the DDA.

[29] We are satisfied that in coming to the finding that the defence has failed to cast a reasonable doubt on the prosecution's case, the learned trial judge had considered and evaluated all of the evidence before him and was right in arriving at the findings and conclusion which he did. The records speak for themselves. For these reasons, we fail to see any merit in counsel's objection on this ground.

[30] It is our unanimous decision that the appeal be hereby dismissed. Both the conviction and sentence by the High Court judge is affirmed.

Appeal dismissed, conviction and sentence affirmed.

Reported by Ashgar Ali Ali Mohamed